

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JOHN D. STEELSMITH**

Claimant

VS.

**ANDBE HOME, INC.**

Respondent

AND

**CORNHUSKER CASUALTY CO.**

Insurance Carrier

Docket No. 1,031,745

**ORDER**

Respondent and its insurance carrier (respondent) requested review of the April 30, 2007, preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore. Randy S. Stalcup, of Wichita, Kansas, appeared for claimant. Ronald J. Laskowski, of Topeka, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant suffered an aggravation of a preexisting neck condition arising out of and in the course of his employment with respondent. The ALJ found that claimant is entitled to medical care for his neck complaints and designated Dr. Paul Stein as his authorized treating physician. The ALJ also ordered that medical expenses incurred by claimant to date be paid as unauthorized medical expenses. Further, temporary total disability compensation was ordered paid to claimant by respondent for the period from November 14, 2006, until claimant is released to return to work, has been offered accommodated work, or has attained maximum medical improvement.

The record is the same as that considered by the ALJ and consists of the transcript of the April 12, 2007, Preliminary Hearing and the exhibits, and the transcript of the deposition of Patty R. Fisher taken April 10, 2007, together with the pleadings contained in the administrative file.

### ISSUES

Respondent argues that the weight of the evidence reveals that claimant did not suffer a compensable injury to his neck on October 1, 2006, while in the employ of respondent.

Claimant requests the Board affirm the ALJ's Order.

The issue for the Board's review is: Did claimant's neck injury result from an accident arising out of and in the course of his employment with respondent on October 1, 2006.

### FINDINGS OF FACT

Claimant was employed by respondent as a cook and dishwasher. On October 1, 2006, he was in the dining room walking toward the kitchen when he slipped on some water on the floor. His feet went out from under him, and he fell backwards. He caught himself as he fell. This occurred about 7:15 or 7:30 p.m. He continued working to finish his shift, which ended at 8 p.m. He did not report his accident to respondent. Claimant reported to work the next day, October 2, even though he noticed some discomfort before he went to work. The next day, October 3, he was not scheduled to work.

On October 3, 2006, claimant sought treatment with his personal physician, Dr. Ruben Silan. He told Dr. Silan that he had pain in his low back and neck and that his left leg was numb. Although Dr. Silan's note reflects that claimant said he had a history of neck and low back pain for years, claimant did not remember giving that information to Dr. Silan. Dr. Silan ordered MRI's for claimant's cervical and lumbar spine. He also gave claimant an off-work slip until he had the MRI's. Claimant brought the off-work slip to his supervisor, Patty Fisher, that same day. He did not advise Ms. Fisher that he had slipped on October 1, 2006.

Claimant called Dr. Silan's office on October 5. He did not talk to Dr. Silan but only talked to his receptionist. Claimant said he told Dr. Silan's receptionist about his work-related accident of October 1, 2006. There is no report of that conversation in Dr. Silan's records, but there is a note dated October 5 indicating that claimant had called complaining that the pain medicine he had been given was not providing him any relief.

MRI's of claimant's cervical and lumbar spine were taken on October 9, 2006. That same day, claimant reported his accident and injury to respondent and filled out an accident report. That accident report set out the facts of his fall but did not indicate that he had twisted, jerked or injured his neck.

The MRI of claimant's cervical spine revealed that claimant had a disc herniation at C5-6 with extension into the left neural foramen. The MRI of claimant's lumbar spine had

no evidence of herniation or impingement and was within normal limits. Claimant saw Dr. Silan again on October 10, at which time they discussed the results of the MRI's. Claimant still reported low back pain and numbness and tingling in his legs. Dr. Silan recommended physical therapy for claimant's low back and referred claimant to a neurologist for his neck.

On October 10, after his appointment with Dr. Silan, claimant returned to respondent and visited with Ms. Fisher. He was crying and told Ms. Fisher that the doctor had told him he had neck problems, but the problems were not related to his slip at work. Claimant said that he needed to stop his workers compensation claim. Claimant had the results of his MRI's with him, as well as an off-work slip. Claimant asked Ms. Fisher whether she thought he could get unemployment or Social Security disability benefits.

Claimant went to physical therapy on October 12, 2006. The therapist's notes of that date indicate:

[Claimant] reports that he has had complaints of both cervical difficulties and lumbar spine difficulties but his lower back is giving him the most difficulty now. He also reports that on or about October 1st he fell at work and possibly had increased symptoms subsequent to that. He denies difficulties initially at work with his fall but said subsequently he has had some challenges. He reports that he has had some histories of difficulty with his spine and has had successful chiropractic care previously.<sup>1</sup>

Claimant returned to Dr. Silan's office on October 16, 2006. At this time claimant reported that his neck was still hurting, and he requested a cervical collar.

On October 30, 2006, respondent's insurance carrier wrote Dr. Silan asking about causation of claimant's low back and neck problems. Dr. Silan responded the same day, stating: "This patient has a chronic condition not an acute problem. There was no mention of injury when I saw him."<sup>2</sup>

Claimant was examined by Dr. Paul Stein on February 12, 2007, at the request of respondent. Claimant denied any prior history of neck symptoms but said he had low back problems since childhood. Claimant gave a history of a slip and fall at work. Claimant said he had stiffness and soreness after the fall that progressively worsened. Claimant told Dr. Stein that on the day of the examination, his low back had returned to its normal state, although he had some intermittent discomfort. His predominant problem on the date of the examination was pain in his neck and left shoulder blade region that extended down the left upper extremity. He had numbness and tingling down the left arm into the fourth and fifth fingers.

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<sup>1</sup> P.H. Trans., Cl. Ex. 1 at 13.

<sup>2</sup> P.H. Trans., Resp. Ex. A at 6.

After examining claimant, Dr. Stein noted that claimant apparently twisted his back at work on October 1, 2006. Dr. Stein also indicated that although there was no reference to a work injury in Dr. Silan's records until October 16, 2006, "no primary care, chiropractic, or osteopathic records have been provided to document recent treatment to the neck or lower back before 10/1/06."<sup>3</sup> Dr. Stein found that claimant has a disk protrusion at C5-6 with left C6 encroachment which was likely responsible for his current neck and left upper extremity symptomatology. Dr. Stein further stated: "At this time, I cannot determine, within a reasonable degree of medical probability or certainty, whether the current cervical disk protrusion and symptomatology is causally related to his work incident of 10/1/06."<sup>4</sup> Dr. Stein stated further that the injury to claimant's low back was temporary.

Ms. Fisher testified that before October 1, 2006, she had discussed with claimant problems with his neck and low back. Claimant complained a lot about headaches, low back pain, and not being able to sleep at night. She carried Aleve on her, and he would ask her for tablets and would take several during the course of a day. Once, in late August or early September 2006, claimant was crying at work because his back hurt him. He told Ms. Fisher he wanted to see a chiropractor, and she told him to call and make an appointment.

#### **PRINCIPLES OF LAW**

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.<sup>5</sup> Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.<sup>6</sup>

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the

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<sup>3</sup> P.H. Trans., Resp. Ex. A at 5.

<sup>4</sup> *Id.*

<sup>5</sup> K.S.A. 2006 Supp. 44-501(a).

<sup>6</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

resulting injury. Thus, an injury arises “out of” employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase “in the course of” employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer’s service.<sup>7</sup>

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.<sup>8</sup> The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.<sup>9</sup>

K.S.A. 2006 Supp. 44-501(a) provides that claimant has the burden of proof:

In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2006 Supp. 508(g) states: “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”

“In this jurisdiction it is not essential that the duration of disability or incapacity of a workman be established by medical testimony.”<sup>10</sup> “A workers compensation claimant’s testimony alone is sufficient evidence of the claimant’s physical condition.”<sup>11</sup>

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>12</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted

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<sup>7</sup> *Id.* at 278.

<sup>8</sup> *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Odell v. Unified School District*, 206 Kan. 752, 481 P.2d 974 (1971); *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, 61 P.3d 81 (2002).

<sup>9</sup> *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

<sup>10</sup> *Hardman v. City of Iola*, 219 Kan. 840, 845, 549 P.2d 1013 (1976).

<sup>11</sup> *Hanson*, 28 Kan. App. 2d 92, Syl. ¶ 2.

<sup>12</sup> K.S.A. 44-534a.

by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.<sup>13</sup>

### **ANALYSIS**

This case presents a close question. Claimant's description of his October 1, 2006, accident is not contradicted directly, but it is called into question by virtue of his chronic preexisting conditions, as well as by the fact that he did not experience much pain or symptoms that day or the next, that he did not promptly report the accident to his supervisor, by claimant's delay in seeking medical treatment, and by the absence of a description of the accident in the history he gave to the initial treating physician. These factors all call into question claimant's version of events and his credibility. Respondent also points to the fact that there is no causation opinion from any of the doctors relating claimant's current condition to an accident at work. Of course, an expert medical causation opinion, while helpful, is not required to prove an accident or an injury. Claimant's testimony alone is sufficient to meet his burden of proof in this regard. As for credibility, when a witness testifies in person before an ALJ, the Board generally gives some deference to the ALJ's determination of that witness's credibility. As is apparent from the ALJ's Order, he obviously weighed the conflicting evidence and, nevertheless, found this claim to be compensable. Although not stated directly, the ALJ must have found the claimant's testimony to be credible because he awarded benefits. After reviewing the entire record compiled to date, this Board Member likewise finds claimant met his burden of proof that he suffered injury by accident as alleged.

### **CONCLUSION**

Claimant has proven he suffered personal injury to his neck from the accident on October 1, 2006, and that the accident arose out of and in the course of his employment with respondent.

### **ORDER**

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated April 30, 2007, is affirmed.

**IT IS SO ORDERED.**

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<sup>13</sup> K.S.A. 2006 Supp. 44-555c(k).

Dated this \_\_\_\_\_ day of August, 2007.

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BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant  
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier  
Bruce E. Moore, Administrative Law Judge